Supreme Court, U.S.
FILED
JAN 17 1984

NO. 83-833

IN THE
Supreme Court of the United States

October Terms 1983

THE MUCKLESHOOT INDIAN TRIBE, et al.

Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD., et al.

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY S. SCHUSTER
COUNSEL OF RECORD
Office of the Tribal Attorney
Muckleshoot Indian Tribe
39015 172nd Avenue S.E.
Auburn, WA 98002
(206) 939-3311

Of Counsel:
Robert L.
Otsea, Jr.

QUESTION PRESENTED

1. Whether the district court and court of appeals correctly found that the United States and the Muckleshoot Indian Tribe intended to reserve title to the bed of the White River when the Muckleshoot Indian Reservation was set aside?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. OPINIONS BELOW	1
II. JURISDICTION	2
III. STATEMENT OF THE CASE	2
A. Procedural History	2
B. Statement of Facts	5
IV. SUMMARY OF ARGUMENT	8
V. ARGUMENT	10
A. This Case Does Not Merit Review Because The Courts Below Applied The Standards Of Montana v. United States, 450 U.S. 911 (1981), To The Findings Of Fact.	10
B. The Decisions Of The Courts Below Do Not Conflict With Montana v. United States.	13
C. There Is No Conflict Among The Cases In The Ninth Circuit Court Of Appeals.	21
D. There Is No Conflict Between The Ninth Circuit And The Seventh Circuit To Warrant Review By This Court.	22
VI. CONCLUSION	25

TABLE OF AUTHORITIES

Page

Table of Cases

Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) 16, 17, 18, 20

Arizona v. California, ____ U.S. ____ 103 S.Ct. 1382 (1983) 21

Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630 (1967) 13

Confederated Salish and Kootenai Tribe v. Namen, 665 F.2d 951 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 314 (1982) 21

Graver Mfg. Co. v. Linde Co., 336 U.S. 271, (1979) 13

Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) 21

Montana v. United States, 450 U.S. 544 (1981) 4, 19-12, 16, 18

Morissette v. United States, 342 U.S. 246 (1952) 12

Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983) 3, 4

Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983) petition for cert. filed, ____ U.S.L.W. ____ (Dec. 9, 1983) 22

State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983) 9

United States v.Aranson, 696 F.2d 654 (9th Cir. 1983) cert. denied ____ U.S.L.W. ____ (Nov. 14, 1983) 22

United States v. Holt State Bank, 270 U.S. 49 (1926) 23

United States v. Washington, 384 F.Supp. 312 (W.D. WA 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), aff'd sub nom, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 5, 20

United States v. Washington, 694 F.2d 188 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 3536 (1983) 22

Statutes

Treaty of Medicine Creek, 10 Stat. 1132 19

Treaty of Point Elliott, 12 Stat. 927 19

Rules and Regulations

Supreme Court Rule 17.1(a) 21

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1983

NO. 83-833

THE MUCKLESHOOT INDIAN TRIBE, et al.

Respondents,

v.

TRANS-CANADA ENTERPRISES, LTD., et al.

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

I. OPINIONS BELOW

The two district court opinions are included in Petitioners' Supplemental Appendices G and K except that page A-76 is missing from Appendix K. The district court's findings of fact and conclusions of law are represented at Supplemental Appendix H. The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 713 F.2d 455 (1983).

II. JURISDICTION

The Muckleshoot Tribe does not disagree with the petitioners' jurisdictional statement.

III. STATEMENT OF THE CASE

The Muckleshoot Tribe agrees with the petitioners'[1/] statement of the case except as noted below.

A. Procedural History

The Muckleshoot Tribe initiated this proceeding in 1977 to eject the petitioners from possession of the former riverbed of both the White River and the land between the former and present northern channels of that river within Section 28 of the reservation. The case was tried to the district court.

In a detailed set of findings based on extensive contemporaneous evidence the district court concluded that the United

---

1/ As used in this brief the "petitioners" or "Trans-Canada" shall mean Trans-Canada Enterprises, its parent company, N.B. Cook Company, as well as Synergy International, Ltd. and Herbert Guenther.

States had intended to reserve the bed of the White River for the Muckleshoot Tribe when it created the Muckleshoot Reservation in 1874. Petitioners' Appendix, A-47, 58 (hereinafter referred to as "App. _____").

Following the entry of the district court's judgment on March 12, 1981, the petitioners appealed that court's ruling. The petitioners did not appeal the district court's decisions on the White River navigability and the nature of the changes in the river's course. Accordingly the Ninth Circuit did not consider those issues on appeal nor are they before the Court at this time. See, Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455, 458 n.3 (9th Cir. 1983). Petitioners also do not appeal the issue of whether the allotment of tribal land to individual tribal members divested the tribe of title to the riverbed. The only issue presented in the petition is whether both lower courts incorrectly found

that the United States and the tribe intended to reserve the bed of the White River for the Muckleshoot Tribe when the Muckleshoot Indian Reservation was created.

Following the appeal of the district court's judgment, this Court issued Montana v. United States, 450 U.S. 544 (1981). In order to give the district court an opportunity to reconsider its ruling in light of Montana, supra, the Ninth Circuit vacated and remanded the original district court judgment. App. J. After briefing by all parties on the impact of Montana the district court reinstated its judgment. App. K.

On March 15, 1983, the Ninth Circuit affirmed the district court's judgment in a per curiam opinion. See Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., supra. The Puyallup Tribe's case referred to in petitioners' brief was decided the same day as the Muckleshoot case by the court of appeals but was never formally consolidated

with the instant case.

B. Statement of Facts

As petitioners have noted, the lower courts found that fishing on the White River and other rivers and streams was clearly the single most important activity for the Muckleshoot Tribe. The River was important not only because of the Tribe's dependence on fishing for food but also because the River was the center of other food resources as well as the Tribe's religious, cultural, and social customs. App. H. A-59; App. K, A-74; App. A, A-5; see also United States v. Washington, 384 F.Supp. 312, 365-367 (W.D. WA 1974), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976), aff'd sub nom, Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979). Traditional fishing by the Muckleshoot Tribe was done on a communal basis rather than individual basis. App. H, A-59.

Traditional fishing techniques required not only the water of the river but also the riverbed itself on which the Indians constructed fish weirs and traps. App. A, A-5. Fish weirs and traps were large fence-like, structures planted in the bed of the river in order to catch fish migrating up river.

Muckleshoot ancestors lived in villages along the White River where they constructed fish weirs and traps which spanned the River. One village and weir site was located in the immediate vicinity of the land in dispute near the junction of the White River and Coal Creek. App. H, A-59, F.F.5.

Following the treaties of Medicine Creek and Point Elliott the President established the Muckleshoot Reservation by Executive Order in 1857. The Reservation was located on a prairie between the Green and White Rivers with no access to either one. App. H, A-61 at F.F. 12.

The record shows that the Muckleshoot

Indians believed that a promise to establish a reservation suitable to their needs had been broken. Id. F.F. 13. In response the local Indian agent in 1859 attempted to correct the situation by publishing notice of a proposed enlargement of the reservation to include lands between the White and Green rivers. Id. at F.F. 14.

From then until 1874 the Indian agents and government officials continued the effort to enlarge the Muckleshoot Reservation to provide access to the White and Green Rivers. The correspondence in this period reflects a continuing concern about Muckleshoot fears that their ancestral homes and fishing grounds would be taken. The agents "repeatedly warned that trouble would result unless the reservation was enlarged in keeping with prior promises" of the United States to include the traditional fisheries on the White and Green Rivers. Id. at F.F. 15.

Finally, in 1874, President Grant issued

an Executive Order setting aside five alternate sections of land through which the White River flowed. This was an addition to the existing Muckleshoot Reservation. Id. App. H, A-61, F.F. 16.

The checkerboard shape of the addition was an exception to United States policy at the time in favor of "compact reservations to prevent interspersed Indian and non-Indian lands." See map at App. F. This exception was made "specifically to include a portion of the White River within the Muckleshoot Reservation." App. H, A-61, F.F. 17.

With the exception of finding of fact 18, the petitioners have not contested on appeal the district court's findings of fact. TransCanada asserted in the Ninth Circuit that Finding 18 is not a finding of fact but a conclusion of law.

IV. SUMMARY OF ARGUMENT

This case does not merit review by the Supreme Court since it involves only an

attempt to have yet another court review the findings below of the district court that were affirmed by the Ninth Circuit Court of Appeals. The lower courts applied the decision by this Court in Montana v. United States, 450 U.S. 544 (1981) to the facts and correctly determined that the United States and the Tribe intended to reserve the bed of the White River when the Muckleshoot Reservation was declared. The only real dispute is whether the lower courts correctly determined United States intent.

Petitioners' effort to create the appearance of a conflict with Montana v. United States ignores the detailed, comprehensive record below that shows that United States intended to reserve the bed. There is no conflict with either Montana or other Ninth Circuit decisions. The decision below also does not conflict with State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). The Seventh Circuit applied the

Montana title principles in a jurisdictional dispute whereas this involves only a title issue. Both Circuits agreed on the applicable law but reached different results based on the strikingly differently facts.

V. ARGUMENT

A. This Case Does Not Merit Review Because the Courts Below Applied The Standards of Montana v. United States, 450 U.S. 911 (1981) To The Findings Of Fact.

This case does not merit review by the Supreme Court since it involves only the routine application of settled law to undisputed facts. Petitioners are unhappy with the lower court's application of Montana v. United States, 450 U.S. 911 (1981) to the facts in this case and seek one more chance to present their case to another court. This is not a substantial basis for review by this Court.

The court of appeals affirmed the detailed and "carefully considered" district court findings that title to the bed of the White River was reserved for the Muckleshoot

Tribe when the reservation was created. Id. 713 F.2d at 456. In making this ruling the court of appeals applied established principles of law in Montana and its predecessors to a different tribe and reservation in a different part of the country than that at issue in Montana.

As petitioners implicitly admit (Pet. at 6) each case applying the Montana test requires an individualized scrutiny of the historical facts to determine the intent of the United States and the Tribe. See, Montana at 552-554. Montana requires a showing of intent that is made in "clear and special words" or "otherwise made plain."[2/] Montana, 450 U.S. at 554. All parties agree that Montana applies. Petitioners only seek to check the correctness of the lower court's findings on United States intent when it

---

2/ The establishment of an Indian reservation can be an "appropriate public purpose" justifying a pre-statehood reservation in trust for an Indian tribe. Montana v. United States, 450 U.S. at 556.

created the reservation. But questions of intent are factual issues which are best left to the trier of fact. See e.g., Morissette v. United States, 342 U.S. 246, 274-276 (1952). A challenge to factual findings without more does not normally present a "special and important reason" justifying review under the Supreme Court Rule 17.

Both the district court and Ninth Circuit undertook the careful examination required here. Indeed, the court of appeals first remanded this case back to the district court for further consideration in light of Montana v. United States, which had been decided after the original district court opinion and findings. See App. J at A-72. The court of appeals affirmed the district court's findings only after the district court again reviewed the case and record after Montana. App. K at A-73. Petitioners chose not to submit evidence to the district court on remand and, in fact, all of the

district court's findings remain uncontested with the exception of finding of fact 18.

Since the issue is the correctness of both the district court rulings and their acceptance by the court of appeals, review has generally been found inappropriate "in the absence of a very obvious and exceptional showing of error." Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 635 (1967), quoting with approval Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

B. The Decisions Of The Courts Below Do Not Conflict With Montana v. United States.

Petitioners seek to create the appearance of an actual conflict with Montana by oversimplifying the lower court's decisions. As shown above the district court's findings were based on a thorough review of the tribe's culture and history and on the historical circumstances surrounding the creation of the reservation. The lower courts did not find the requisite intent to

reserve title to the riverbed solely on a bare finding of "historical tribal dependence upon fishing." Compare, Petition at i., Question Presented. The evidence of a plain intent to reserve the White River bed goes well beyond that. Petitioners admit that the White River itself was crucial to the Muckleshoot Tribe:

> The rivers and streams along which they lived were the focal point of their economy, culture and religion. They were dependent on these watercourses for food, materials, self-identification, language and religious practices.

Petition at 2.

The Muckleshoot Reservation was expanded in 1874 for the express purpose of providing access to traditional fishing grounds on the White River. This expansion followed years of concern by the federal government about Muckleshoot fears that their traditional fishing grounds and homes would be taken and that trouble would result. App. A-60. In response to these concerns, the President

created an unusual elongated, reservation through which the White River flowed with a primary purpose of providing access to the White River. App. A-60, 61.

One Muckleshoot village, located near the disputed area of the riverbed, had a fish weir which required express use of the riverbed for its construction and operation. See Statement of the Facts I, B, supra at 4.

The district court thus found United States intent based on historic Indian use of the riverbed coupled with express United States statements and actions to protect that use. App. A-75, 76, F.F. 13-18. The detailed careful findings show more than a dependency on fishing. They also show that the court's decisions do not rest on the "mere fact that the bed of navigable water lies within the [reservation] boundaries." Montana at 554 quoted in Petition at 7.[3/]

3/ Similarly fishing is not relevant only to the existence of a public exigency but also as evidence of intent. Compare Petition (cont'd)

The district court's findings are certainly sufficient to satisfy this Court's decision in Montana . Indeed, even though there is more than just evidence of dependence on fishing, that by itself may be sufficient under the Montana line of cases.[4/] As an example of the necessary plain intent required to reserve title for a tribe, the Montana Court cited Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918) as contrast with the Crow Tribe's situation. Montana at 556. In Montana the Court noted that the Crow Tribe was chiefly dependent on buffalo and that fishing was relatively unimportant. Id.

Footnote 3/ Cont'd
at 8. Moreover, an additional public exigency for reserving the bed was the perceived need to prevent trouble between the Indians and nearby non-Indians should Muckleshoot not have its riverbed and fishery secured for it. App. A-60, F.F. 15.

4/ The lower courts were not only not clearly erroneous but were in fact supported overwhelmingly by the evidence none of which is disputed by the petitioners. See 713 F.2d at 456.

In Alaska Pacific Fisheries, Congress reserved for the Indians "the body of lands known as Annette Islands." Id. 248 U.S. at 78. The Court held that the language was intended to include the land under the navigable waters surrounding the islands when viewed in the context of the historical "circumstances in which the reservation was created." Id. Like the Muckleshoot Indians, the Metlakahtla Indians were encouraged to inhabit a reservation whose primary value was for the fisheries running through it. The dry upland in neither case were sufficient to satisfy the Indians' needs especially in light of the fact that both tribes were primarily fishermen. Id. at 88. And in both cases the reservation were set aside expressly to provide a livelihood for the Indians.

Since - as petitioners concede - the Muckleshoot Indians were and are highly dependent on White River fishing and since the United States was aware of this need in

the instant case and responded to it, the lower courts were not incorrect to rely on this as evidence of intent to reserve the riverbed. Evidence of dependence of fishing was certainly found to be highly relevant by both the Montana and Alaska Pacific Fisheries courts.

Despite the clear relevance of fishing to bed ownership in Montana and Alaska Pacific Fisheries, petitioners present a variety of arguments in an attempt to prove that the lower courts incorrectly decided this case. Petitioners first argue that the court of appeals erroneously relied on the rule that ambiguous statements are to be construed in the Indians favor. Pet. at 11. There is no evidence that this rule, is inconsistent with Montana. The lower courts carefully applied this Court's principles from Montana and Alaska Pacific Fisheries in reviewing the evidence. And is rule of construction as cited with approval in Alaska

Pacific Fisheries, 248 U.S. at 89. The district court and court of appeals recognized the duty to find a plain or express statement of intent to justify reservation of the bed. Petitioners do not show that the court of appeals ever shifted the burden of proof away from the tribe.

Secondly, petitioners argue that because the Muckleshoot Tribe is a successor to signatories of the Treaties of Point Elliott (12 Stat. 927) and Medicine Creek (10 Stat. 1132) its fishing rights were already protected before the creation of the reservation. Pet. at 13. This issue was before the lower courts that held that the United States and the Tribe still intended to reserve the riverbed for the Tribe as an additional guarantee of the reservation fishery. Because of the trouble with surrounding non-Indians, the Muckleshoot Tribe believed that they still had to reserve the riverbed to insure access on-reservation to their

fishery for their fish weirs and traps. App. A-60-61.

Petitioners also argue that there is no legal or logical connection between ownership of the bed and protection of fishing rights. Pet. at 13-14. As already shown, however, there is basis in both law (Montana and Alaska Pacific Fisheries) and logic for this connection. See, Statement Of Facts, supra at 5-8. Moreover, the ultimate question is the intent of the parties in 1874, not present day common law principles. There is no evidence on the record that either the Indians in 1874, the President or any of the government officials understood the common law on the relationship between real property, water rights and fisheries or that they intended to incorporate that into this Executive Order. Compare, Fishing Vessel Association, supra 443 U.S. at 658, n.23.[5/]

5/ Moreover, such common law principles do not apply in determining rights reserved when Indian reservations are created whether they (cont'd)

Petitioners present no argument to satisfy their burden of showing that the district court or the court of appeals acted incorrectly let alone "has departed from the accepted and usual course of judicial proceedings. . ." to warrant review by this Court. Compare, Sup.Ct. Rule 17.1(a).

C. There Is No Conflict Among The Cases In The Ninth Circuit Court Of Appeals.

There is nothing in the other recent Ninth Circuit cases cited by petitioners that conflict with Montana to call for the grant of their petition. All of the cases applied Montana in a variety of factual contexts to determine whether the district courts had been clearly erroneous in their findings. Depending on the tribe and reservation, the court of appeals found the necessary intent to reserve the navigable bed in some cases.

Footnote 5/ Cont'd
be water rights, Arizona v. California, ____ U.S. ____ 103 S.Ct. 1382 (1983) or fishing rights, Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968).

E.g., Confederated Salish and Kootenai Tribe v. Namen, 665 F.2d 951 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 314 (1982); United States v. Washington, 694 F.2d 188 (9th Cir. 1982) cert. denied ____ U.S. ____, 103 S.Ct. 3536 (1983); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983) petition for cert. filed ____ U.S.L.W. ____ (Dec. 9, 1983). In other cases the court has found the necessary intent lacking. e.g., United States v. Aranson, 696 F.2d 654 (9th Cir. 1983) cert. denied ____ U.S.L.W. ____ (Nov. 14, 1983). At issue in all cases is a factual dispute. Although the Ninth Circuit may have concluded that dependence on fishing is highly relevant, there is nothing to indicate that other evidence is not also required to show the necessary intent.

D. There is No Conflict Between The Ninth Circuit and the Seventh Circuit.

Contrary to petitioners' assertions, there is no true conflict between the Ninth

Circuit decision and State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). Although the Seventh Circuit did use the Montana title test, the issue was not whether the tribe owned the bed of a navigable lake or river but whether it had jurisdiction to regulate non-Indian activity on those on-reservation lakes. 698 F.2d at 1334-1335.[6/]

Moreover, the Circuits did not disagree on the applicable law. Rather they reached different conclusions as to Indian ownership of the submerged lands at issue but applied the same test from Montana. The different result can be attributed to the courts looking at different Indian reservations created under strikingly different facts. The finding of fact in Baker, unlike the present

---

6/ The Court then applied Montana to determine whether the intent in a 1854 Chippewa Treaty to oust the State of Wisconsin from jurisdiction on these lakes was "definitely declare or otherwise made plain" or of a "public exigency." Id. 698 F.2d 1323 quoting Montana, supra 450 U.S. at 552 quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926).

case, was that there was "nothing in the language or history of the [post-statehood] treaty to suggest that in 1854 the United States was more solicitous of Chippewa fishing and hunting rights in navigable waters then of state sovereignty." Id. at 1335. Secondly, the Indian reservation was not created until after statehood unlike this case where the reservation was created and expanded many years prior to statehood. And there was nothing in the record or findings there to "charge the United States with knowledge of the Chippewas' understanding or to warrant the inference that the United States intended to convey such a power." (cite omitted) Id. The uncontested findings in the instant case are completely different.

It is not a valid basis for review merely because both courts, applying the same test, reached different conclusions based on different facts.

VI. CONCLUSION

For the above reasons the petition for a writ of certiorari should be denied.

DATED this _____ dav of January, 1984.

Respectfully submitted,

Of Counsel:
Robert L.
Otsea, Jr.

JEFFREY S. SCHUSTER
Office of the Tribal Attorney
Muckleshoot Indian Tribe